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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FILIA KOURTIS and  
CONSTANTINOS KOURTIS,  
  
Plaintiffs,

v.

JAMES CAMERON,  
INTERNATIONAL CREATIVE  
MANAGEMENT, MARIO KASSAR,  
JEFFREY BERG and JOSEPH  
ROSENBERG,

Defendants.

CASE NO. CV 02-2906 DT (RNBx)

**ORDER GRANTING WITHOUT  
PREJUDICE DEFENDANTS JAMES  
CAMERON, INTERNATIONAL  
CREATIVE MANAGEMENT,  
JEFFREY BERG AND JOSEPH  
ROSENBERG'S MOTION TO  
DISMISS FOR FAILURE TO STATE  
A CLAIM UPON WHICH RELIEF  
MAY BE GRANTED**

**1. Background**

Plaintiffs Filia and Constantinos ("Con") Kourtis ("Plaintiffs") are authors of the concept of "The Minotaur," an idea for a film. Plaintiffs claim that defendants James Cameron, International Creative Management ("ICM"), Jeffrey Berg, Joseph Rosenberg and Mario Kassar misappropriated their idea for a shape-changing character. Plaintiffs claim that the defendants copied their idea by creating the film "Terminator II."

Plaintiffs filed this action for copyright violations as well as several state law claims. In 2003, this Court dismissed all claims – the state law claims on statute of

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1 limitations grounds, and the copyright claims because it determined collateral  
 2 estoppel applied. Kourtis v. Cameron, 2003 U.S. Dist. LEXIS 26,603 (C.D. Cal.  
 3 May 2, 2003). Plaintiffs appealed. The Ninth Circuit affirmed the dismissal of state  
 4 law claims, but concluded that collateral estoppel did not preclude Plaintiffs from  
 5 pursuing their copyright claims. Id.

6 On remand, defendants Cameron, Berg, Rosenberg and ICM ("Defendants")  
 7 move to dismiss the action for failure to state a claim upon which relief may be  
 8 granted.

#### 9 **A. Factual Summary<sup>1</sup>**

10 Plaintiffs are the authors of the concept of the film "The Minotaur," and a  
 11 treatment thereof. Complaint ¶ 11. The Kourtises hired a writer, William Green, to  
 12 actually write a screenplay based on their treatment, but the Kourtises retained the  
 13 copyrights to the film.<sup>2</sup> Id. ¶ 13. The Kourtises also hired an artist to create artwork  
 14 for the film, based on their instructions. Id. ¶ 15.

15 James Cameron is a film producer and director who created the films "The  
 16 Abyss" and "Terminator II: Judgment Day" ("Terminator II"). Id. ¶ 4. Cameron's  
 17 agent was employed by ICM at the time. Id. Jeffrey Berg and Joseph Rosenberg  
 18 were employees of ICM and were involved in supplying the Plaintiffs' materials to  
 19 Cameron.

20 Mario Kassir was one of the owners of Carolco and a producer of the original  
 21

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22 <sup>1</sup> In considering a motion to dismiss under Rule 12(b)(6), the Court must  
 23 assume the plaintiff's factual allegations are true, and must construe the complaint in  
 24 a light most favorable to the plaintiff. See United States v. City of Redwood City,  
 25 640 F.2d 963, 966 (9th Cir. 1981). Therefore, the following facts are taken from  
 Plaintiffs' Complaint only.

26 <sup>2</sup> The Kourtises later prevailed in an Australian lawsuit against Green  
 27 determining they, and not Green, owned the rights to "The Minotaur." Complaint ¶  
 28 34.

1 "Terminator" and "Terminator II." Id. ¶ 6. Kassar purchased the rights to  
2 "Terminator III" and "Terminator IV" following Carolco's bankruptcy. Id.

3 On July 31, 1989, Filia Kourtis submitted the Kourtis treatment and artwork  
4 for "The Minotaur" to Berg at ICM. Id. ¶ 18. On August 4, Con Kourtis confirmed  
5 with Berg that he had the treatment and artwork, and provided him a draft script. Id.  
6 Berg told Con Kourtis that he would give all the material to Cameron. Id.  
7 Meanwhile, Kassar had already received a draft script of "The Minotaur" on  
8 February 23, 1989. Id. ¶ 41. Cameron had access to this script through Kassar. Id.  
9 ¶ 42.

10 In September 1989, Cameron called Con Kourtis, and told him that he loved  
11 the project and his agent, Berg, would be calling him soon. Id. ¶ 19. Cameron took  
12 some time considering whether to make a film based on the Kourtises' material, and  
13 in January 1990, Berg informed Con Kourtis that Cameron was busy but Rosenberg  
14 would package the project. Id. ¶¶ 20-22. Con Kourtis soon forwarded Rosenberg  
15 a second draft script, also written by Green. Id. ¶ 23. On August 29, 1990,  
16 Rosenberg acknowledged in writing that he had received this script, but stated he  
17 could not pursue the project. Id. ¶ 26.

18 In August 1989, "The Abyss" was released in the United States. Id. ¶ 44. It  
19 included a water "morphing" scene, added right before release of the movie, that was  
20 lifted from "The Minotaur" project. Id.

21 In April 1991, "Terminator II" was released in the United States. Id. ¶ 29. In  
22 September 1991, it was released in Australia. Id. In late 1991, the Plaintiffs  
23 discovered that Cameron, Berg, Rosenberg, ICM, Kassar and others had "stolen their  
24 Minotaur Project I, including various ideas as they were expressed in treatments,  
25 scripts, and art work" for use in "Terminator II." Id. ¶ 30. The full list of similarities  
26 between "Terminator II" and "The Minotaur" is detailed in Exhibit 1 of the  
27 Complaint. Id. ¶ 54.

1           “Terminator II” continues to gross enormous profits. *Id.* ¶ 55. The film  
2 continues to air on television, DVDs and videos of the film are sold and rented on  
3 a regular basis, and products based on the movie, such as video games and action  
4 figures, continue to be sold. *Id.* ¶ 58. At the time of filing of the suit, Kassar  
5 anticipated producing “Terminator III,” *id.* ¶ 57, and the Court takes judicial notice  
6 that this film has now been completed and released, although it takes no position on  
7 whether Kassar (or any other defendant) was involved in its production.

8  
9           **B. Procedural Summary**

10           On April 9, 2002, Plaintiffs filed their Complaint in the United States District  
11 Court for the Central District of California, and this action was assigned to Judge A.  
12 Howard Matz.

13           On May 3, 2002, the case was transferred to Judge William Matthew Byrne,  
14 Jr., for all further proceedings, pursuant to General Order 224.

15           On July 22, 2002, defendants ICM, Green and Rosenberg filed a Notice of  
16 Motion and Motion to Dismiss for Failure to State a Claim Upon Which Relief May  
17 Be Granted. On August 13, 2002, Kassar was permitted by the Court to join the  
18 Motion to Dismiss.

19           On August 12, 2002, Plaintiffs filed an Opposition to the Motion to Dismiss.  
20 On August 19, 2002, ICM, Green and Rosenberg filed a Reply to Plaintiffs’  
21 Opposition.

22           On May 2, 2003, the Court granted Defendants’ Motion to Dismiss and on  
23 June 18, 2003, Judgment was entered on behalf of all defendants.

24           Plaintiffs appealed to the Ninth Circuit Court of Appeals, which issued its  
25 decision affirming in part and reversing in part the District Court on August 15,  
26 2005. *See Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005).

27           On remand, defendants Cameron and Kassar moved for Plaintiffs to post a  
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1 costs bond before proceeding with this litigation. Cameron filed his Notice of  
2 Motion and Motion on December 9, 2005. Kassir filed a Notice of Joinder and  
3 Joinder on December 19, 2005. Plaintiffs filed their Opposition on December 27,  
4 2005. Cameron filed a Reply on December 29, 2005.

5 On January 24, 2006, the case was reassigned to Judge Dickran Tevrizian for  
6 all further proceedings.

7 On January 30, 2006, defendant Kassir filed an Answer to the Complaint.

8 Also on January 30, 2006, defendant Cameron filed a Motion of Motion and  
9 Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted.  
10 On January 31, 2006, defendants ICM, Berg and Rosenberg filed a Notice of Joinder  
11 and Joinder to Cameron's Motion to Dismiss. Plaintiffs have not filed an  
12 Opposition. On February 28, 2006, the Court issued an Order taking these motions,  
13 the subject of this Order, under submission.

14 On February 14, 2006, the Court granted Cameron's Motion for Plaintiffs to  
15 Post a Costs Bond, but denied Kassir's Motion for the same.

16 Pursuant to a Scheduling Order filed by Judge Byrne on November 21, 2005,  
17 the current operative dates of this matter are as follows: July 31, 2006 (discovery  
18 completed); August 14, 2006 (expert discovery completed); August 28, 2006  
19 (motions cut-off date); October 3, 2006 (pre-trial conference); and October 17, 2006  
20 (trial).

## 21 22 **II. Discussion**

### 23 **A. Standard**

#### 24 **1. Motion to Dismiss for Failure to State a Claim**

25 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may seek  
26 to dismiss a claim for "failure to state a claim upon which relief can be granted."  
27 Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiff's claim if it appears  
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1 beyond doubt that the plaintiff can prove no set of facts in support of his claim which  
2 would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Russell  
3 v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a  
4 motion to dismiss is not whether a plaintiff will prevail in the action, but whether a  
5 plaintiff is entitled to offer evidence in support of his claim. See Scheuer v. Rhodes,  
6 416 U.S. 232, 236 (1974).

7 In considering a motion to dismiss under Rule 12(b)(6), the Court must  
8 assume the plaintiff's factual allegations are true, and must construe the complaint  
9 in a light most favorable to the plaintiff. See United States v. City of Redwood City,  
10 640 F.2d 963, 966 (9th Cir. 1981). The sole issue raised by such a motion is whether  
11 the facts pleaded would, if established, support a valid claim for relief. Therefore,  
12 it is only an extraordinary case in which dismissal is proper. Corsican Prods. v.  
13 Pitchess, 338 F.2d 441, 442 (9th Cir. 1964). Dismissal is proper if a complaint is  
14 vague, conclusory, and fails to set forth any material facts in support of the  
15 allegation. See N. Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir.  
16 1983).

17 When ruling on the motion, the Court may consider only the following  
18 documents: (1) the complaint; (2) any material properly submitted with the  
19 complaint, Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19  
20 (9th Cir. 1989); and (3) any matters that are properly subject to judicial notice.  
21 MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). The Court need  
22 not accept as true: (1) any allegation that contradicts facts of which it may take  
23 judicial notice, Mullis v. United States Bankr. Court, 828 F.2d 1385, 1388 (9th Cir.  
24 1987); (2) any conclusory allegations, unreasonable inferences, or unwarranted  
25 deductions of fact, W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981);  
26 or (3) any allegation that is contradicted by an exhibit attached to the complaint.

1 Durning v. First Boston Corp., 815 F.2d 1265, 1266 (9th Cir. 1987).<sup>3</sup>

2 Where a motion to dismiss is granted, a district court should provide leave to  
3 amend unless it is clear that the complaint could not be saved by any amendment.  
4 See Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996).

## 5 2. Copyright Law

6 An owner of copyrighted material has the exclusive right to (1) reproduce the  
7 copyrighted works, (2) prepare derivative works based upon the copyrighted work,  
8 and (3) distribute copies of the copyrighted work. 17 U.S.C. § 106. In the case of  
9 motion picture, the owner also has exclusive rights to (4) perform the work publicly  
10 and (5) display the work publicly. Id. A derivative work is a work based on one or  
11 more pre-existing works in any form in which a work may be recast, transformed or  
12 adapted. Id. § 101. The distribution of a derivative work, without the permission of  
13 the author of the pre-existing work, infringes on the rights of that author. Id. §  
14 103(b); Stewart v. Abend, 495 U.S. 207, 223-25 (1990). To establish copyright  
15 infringement, two elements must be proven: (1) ownership of a valid copyright; and  
16 (2) copying of the constituent elements of the work that are original. Feist Publ'ns,  
17 Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Twentieth Century Fox Film  
18 Corp. v. Entm't Distrib., 429 F.3d 869, 876 (9th Cir. 2005). Absent direct evidence  
19 of copying, proof of infringement can be made by showing (1) the defendant had  
20 "access" to the plaintiff's work and (2) the works are substantially similar. Three  
21 Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). Copyright law also  
22 recognizes both contributory and vicarious infringement. One commits contributory  
23 infringement by intentionally inducing or encouraging direct infringement, and one

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24  
25 <sup>3</sup> Although a court retains discretion to consider matters outside the pleadings  
26 in a Motion to Dismiss under Rule 12(b)(6) (converting the motion into one for  
27 summary judgment under Rule 56), see Jackson v. S. Cal. Gas Co., 881 F.2d 638, 642  
28 n.4 (9th Cir. 1989), the Court will not do so in this instance.



1 commits vicarious infringement by profiting from direct infringement while  
2 declining to exercise a right to stop or limit it. MGM Studios Inc. v. Grokster, Ltd.,  
3 \_\_\_\_ U.S. \_\_\_\_, 125 S. Ct. 2764, 2776 (2005).

4 The statute of limitations on claims of copyright infringement is three years.  
5 Id. § 507(b). The statute runs from the time plaintiff knows or has reason to know  
6 of the defendant's infringement. See Kling v. Hallmark Cards, Inc., 225 F.3d 1030,  
7 1038 (9th Cir. 2000). Even if subsequent infringing acts occurred within the three-  
8 year period, a plaintiff may not "reach back" and sue for acts otherwise barred by the  
9 state of limitations. Roley v. New World Pictures Ltd., 19 F.3d 479, 481 (9th Cir.  
10 1994).

### 11 B. Analysis

12 Plaintiffs must first show ownership of a valid copyright. See Feist, 499 U.S.  
13 at 361. Plaintiffs have adequately alleged that they owned the rights to "The  
14 Minotaur." Plaintiffs created an original treatment for the film, retained a  
15 screenwriter to write two draft scripts based upon their treatment, and later wrote  
16 their own draft script. Plaintiffs have shown that they are the proper owners of the  
17 rights in the drafts prepared by the screenwriter as well. The Court finds that  
18 Plaintiffs have adequately plead ownership of a valid copyright in "The Minotaur."

19 Plaintiffs must also allege the copying of constituent elements of the work that  
20 are original. See id. Plaintiffs have not shown direct evidence of copying.  
21 However, proof of infringement may still be presented by showing (1) the defendant  
22 had "access" to the plaintiff's work and (2) the works are substantially similar. See  
23 Three Boys Music Corp., 212 F.3d at 481. Here, Plaintiffs have shown that the  
24 defendants had "access" to "The Minotaur." First, Berg told Con Kourtis that he  
25 would pass on "The Minotaur" material to Cameron. Second, Kassir had a draft  
26 script of "The Minotaur," and he and Cameron would use such materials to  
27 collaborate while preparing films. Third, Cameron actually called Con Kourtis  
28



1 concerning the script. These allegations, taken together, are more than sufficient to  
2 prove access.

3 Plaintiffs also present evidence that the works are substantially similar.  
4 Specifically, Plaintiffs attach to their Complaint Exhibit 1, which details at least  
5 twenty alleged similarities between "Terminator II" and "The Minotaur" treatment  
6 and script. As such, Plaintiffs have adequately plead substantial similarity.  
7 Therefore, the Court finds Plaintiffs have adequately plead that the creation of  
8 "Terminator II" – the writing and filming of the movie – infringed upon Plaintiffs'  
9 work.

10 However, the crux of this motion concerns whether the statute of limitations  
11 has run on Plaintiffs' copyright claims. The statute of limitations on claims of  
12 copyright infringement is three years, see 17 U.S.C. § 507(b), and runs from the time  
13 plaintiff knows or has reason to know of the defendant's infringement. See Kling,  
14 225 F.3d at 1038. Plaintiffs claim they discovered the infringing nature of  
15 "Terminator II" in late 1991. Therefore, Plaintiffs would have been required to file  
16 suit for copyright infringement by late 1994. They did not do so.

17 However, Plaintiffs claim that "Terminator II" has been continuously  
18 infringing their copyright. Plaintiffs' complaint was filed on April 9, 2002. Any  
19 infringements that are still actionable – that is, are not barred by the statute of  
20 limitations – must have occurred on or after April 9, 1999. See Roley, 19 F.3d at  
21 481. Plaintiffs claim many instances of infringement subsequent to April 9, 1999;  
22 to wit, the airing of "Terminator II" on television, the sale and rental of DVDs and  
23 videos of "Terminator II," and the marketing and sale of products based on the  
24 movie (such as video games and action figures). If accurate, these appear to properly  
25 allege the infringement of Plaintiffs' rights.

26 However, Plaintiffs' pleadings currently contain a fatal flaw, pointed out by  
27 Defendants. A careful reading of the Complaint shows that no claim has been stated  
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against Cameron, ICM, Berg or Rosenberg during the operative time period. Plaintiffs have not specifically alleged that the Defendants exploited the film, broadcast the film, manufactured DVDs or videos, or otherwise used Plaintiffs' creative materials, on or subsequent to April 9, 1999. Nor do Plaintiffs allege that the Defendants granted any rights to others to do so during this time period. In short, at this time Plaintiffs fail to state a claim against Cameron, ICM, Berg or Rosenberg upon which relief may be granted.

**III. Conclusion**

For the foregoing reasons, the Court **GRANTS without prejudice and with 30 days leave to amend** Cameron, ICM, Berg and Rosenberg's Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted.

IT IS SO ORDERED.

DATED: MAR - 6 2006

**DICKRAN TEVRIZIAN**  
\_\_\_\_\_  
Dickran Tevrizian, Judge  
United States District Court